FEDERAL COURT OF AUSTRALIA

Bentley Capital Limited v Keybridge Capital Limited [2019] FCA 1675

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| File number: | WAD 475 of 2019 |
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| Judge: | **BANKS-SMITH J** |
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| Date of judgment: | 11 October 2019 |
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| Catchwords: | **CORPORATIONS** - deadlock - urgent hearing - meetings of directors - public company - practice of directors as to conduct of meetings - where plan to remove chairperson who holds casting vote - where resolutions proposed at first meeting without notice - where purpose of first meeting otherwise disclosed - whether notice of proposed resolutions was required - whether resolutions of first meeting valid - where second meeting convened for stated separate purpose - where resolutions proposed at second meeting to reverse resolutions of first meeting and to remove alternate director - no prior notice of proposed resolutions - whether resolutions of second meeting valid - declarations made**CORPORATIONS** - alternate director - where removal of alternate director mid-meeting without notice - whether resolution valid - declarations made |
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| Legislation: | *Corporations Act 2001* (Cth) ss 201K, 203E, 1322 |
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| Cases cited: | *Australian Hydrocarbons NL v Green* (1985) 10 ACLR 72*Australian Securities and Investments Commission v Rich* [2003] NSWSC 85; (2003) 174 FLR 128*Aveo Group Limited v State Street Australia Ltd in its capacity as custodian for the Retail Employees Superannuation Pty Limited as trustee of the Retail Employees Superannuation Trust* [2015] FCA 1019*Barron v Potter* [1914] 1 Ch 895*Bell v Burton* (1993) 12 ACSR 325*Colorado Constructions Pty Ltd v Platus* [1966] 2 NSWR 598*Deputy Commissioner of Taxation (NSW) v Mutton* (1988) 12 NSWLR 104*Dhami v Martin* [2010] NSWSC 770; (2010) 241 FLR 165*Efstathis v Greek Orthodox Community of St George* [1989] 1 Qd R 146*Geelong School Supplies Pty Ltd v Dean* [2006] FCA 1404*Gibb v Federal Commissioner of Taxation* (1966) 118 CLR 628*Goodwin v Phillips* (1908) 7 CLR 1*In the matter of Warwick Keneally as administrator of Australian Blue Mountain International Cultural & Tourist Group Pty Ltd (admin apptd)* [2015] NSWSC 937*Kelly v Wolstenholme* (1991) 4 ACSR 709*La Compagnie De Mayville v Whitley* [1896] 1 Ch 788*Markwell Bros Pty Ltd v CPN Diesels (Qld) Pty Ltd* [1983] 2 Qd R 508*McLure v Mitchell* (1974) 24 FLR 115*Mercanti v Mercanti* [2016] WASCA 206; (2016) 50 WAR 495*Molopo Energy Limited 03R, 04R & 05R* [2017] ATP 12*National Dwelling Society v Sykes* [1894] 3 Ch 159*NRMA Ltd v Gould* (1995) 13 ACLC 1518*Official Trustee in Bankruptcy v Buffier* [2005] NSWSC 839; (2005) 54 ACSR 767*Poliwka v Heven Holdings* (1992) 7 ACSR 85*Re Chevron Furnishers Pty Ltd (In liq)* [1994] 2 Qd R 475*Re East Norfolk Tramways Co* [1877] 5 Ch D 963*Re Homer District Consolidated Gold Mines; Ex parte Smith* (1888) 39 Ch D 546*Re Ryde Ex-Services Memorial and Community Club Ltd (Administrators Appointed)* [2015] NSWSC 226*Swiss Screens (Australia) Pty Ltd v Burgess* (1987) 11 ACLR 756*Toole v Flexihire Pty Ltd* (1991) 6 ACSR 455*Wilson v Manna Hill Mining Company Pty Ltd* [2004] FCA 912*Wishart v Bodkin* (1960) 3 FLR 464*Woonda Nominees v Chng* [2000] WASC 173 |
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| Registry: | Western Australia |
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| Division: | General Division |
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| Sub-area: | Economic Regulator, Competition and Access |
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| Category: | Catchwords |
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ORDERS

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|  | WAD 475 of 2019 |
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| BETWEEN: | BENTLEY CAPITAL LIMITED (ACN 008 108 218)First PlaintiffWILLIAM MATTHEW JOHNSONSecond Plaintiff |
| AND: | KEYBRIDGE CAPITAL LIMITED (ACN 088 267 190)First DefendantAUSTRALIAN STYLE GROUP PTY LTD (ACN 108 841 103)Second DefendantJOHN DEAN PATTONThird DefendantJEREMY MARTIN KRIEWALDTFourth Defendant |

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| JUDGE: | BANKS-SMITH J |
| DATE OF ORDER: | 11 OCTOBER 2019 |

THE COURT DECLARES THAT:

1. The resolutions purportedly passed by the directors of the first defendant on 10 July 2019 are invalid and of no force and effect.
2. The resolutions purportedly passed by the directors of the first defendant on 16 July 2019 are invalid and of no force and effect.

THE COURT ORDERS THAT:

1. The plaintiffs' application for a declaration that the resolutions purportedly passed by the board of the first defendant on 10 July 2019 are valid and of full force and effect is refused.
2. The third defendant's cross-claim for a declaration to the effect that the resolutions purportedly passed by the board of directors of the first defendant on 16 July 2019 are valid and of full force and effect is refused.
3. There is liberty to apply limited to any relief sought relating to the proposed appointment of an independent chairperson for the general meetings of the members of the first defendant scheduled for 14 October 2019.
4. The claim and cross‑claim are otherwise dismissed.
5. Costs reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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REASONS FOR JUDGMENT

BANKS-SMITH J:

1. **Keybridge** Capital Limited is listed on the Australian Securities Exchange (**ASX**). Two general meetings of its members are scheduled for 10.00 am AEST and 12.00 noon AEST respectively on Monday, 14 October 2019.
2. The four appointed directors appear to be in a position of intractable deadlock.
3. A dispute has arisen as to whether resolutions purported to have been made by the directors on each of 10 July 2019 and 16 July 2019 are valid and, it follows, whether the purported replacement of the chairperson of Keybridge by one of those resolutions was valid. The identity of the chair has some importance to the management of Keybridge as that person has the ability to break deadlocks on the part of the directors through the exercise of a casting vote.
4. In light of the pending general meetings, the matter has come before the Court on an expedited basis.

# Background matters

## Parties/persons

1. There were at the relevant time four directors of Keybridge. Simon Cato and the second plaintiff, William Johnson, were appointed in July 2016. They were originally nominated by a wholly owned subsidiary (Scarborough Equities Pty Ltd) of the first plaintiff, **Bentley** Capital Limited. Bentley holds around 20% of the issued shares in Keybridge. Mr Cato, Mr Johnson and Farooq Khan are directors of Bentley.
2. John Patton and Jeremy Kriewaldt were appointed directors of Keybridge in August 2016 and October 2016 respectively. They were nominated by or on behalf of Australian **Style Group** Pty Ltd, which holds around 22% of the issued shares in Keybridge. There is a third large shareholder, being WilsonAsset Management Group, which also holds around 22% of the issued shares.
3. On the same date that Mr Kriewaldt was appointed a director (13 October 2016), Mr Patton was appointed as the chairperson of Keybridge and Victor Howas appointed as company secretary. Mr Ho is also the company secretary of Bentley.
4. Relevantly, at a board meeting of 24 June 2019 Mr Khan was appointed an alternate director for Mr Cato for the fixed period 26 June 2019 to 18 July 2019, as Mr Cato was travelling to Europe during that time and had informed the board that he would not be accessing his emails during the trip.
5. In essence, these proceedings have come about because of conflict between two camps, with Mr Johnson and Mr Khan in one camp, and Mr Patton and Mr Kriewaldt in the other. In these proceedings, Bentley and Mr Johnson as plaintiffs pursue certain relief, as does Mr Patton as third defendant. Keybridge was represented at the hearing by counsel but only for the purpose of indicating that it would abide the decision of the Court and wished to be heard on the issue of costs. Style Group has not participated in the proceedings. It indicated it would abide the decision of the Court. Mr Kriewaldt was called as a witness by Mr Patton and gave evidence, but otherwise did not participate in the proceedings and agreed to abide the decision of the Court.

## Governed by constitution

1. Keybridge has a constitution which governs its internal management. All replaceable rules are excluded except so far as they are repeated in the constitution.
2. I have set out in Annexure A the provisions of the constitution that are central to these reasons. In short they relate to the powers of the directors to call meetings and appoint/remove directors.

## The involvement of Mr Bolton

1. In summary, the disharmony between the directors has at its heart concern about the appointment of Nicholas Bolton as the chief executive officer of Keybridge, his conduct in pursuing a particular transaction on behalf of Keybridge and disagreement as to the company's disclosure obligations to the market relating to that transaction.
2. Mr Bolton has at various times in the past been a director and the managing director of Keybridge. Style Group is the parent company of the wholly owned subsidiary Australian **Style Holdings** Pty Ltd. The shares in Style Holdings are owned by Mr Bolton (as to 1 share) and his sister (as to 99 shares).
3. In November 2015 ASIC disqualified Mr Bolton from managing corporations for three years (expiring 16 November 2018). According to the ASIC media release at the time, the disqualification followed an ASIC investigation into a company known as Australian Style Investments Pty Ltd, which found that Mr Bolton breached his duties as a director and that he failed to hold adequate records to explain the financial position of the company. According to ASIC, he was a director of eleven companies which had been placed into liquidation, with creditors owed a deficiency exceeding $25 million.
4. On 14 October 2016 (the day after Mr Patton was appointed chair), Mr Bolton was appointed as a consultant of Keybridge.
5. On 8 May 2019 there was a meeting of the directors of Keybridge. Mr Patton and Mr Kriewaldt voted in favour of the appointment of Mr Bolton as CEO. Mr Cato and Mr Johnson voted against his appointment. Mr Patton exercised his casting vote as chair to appoint Mr Bolton.
6. In a market announcement of 29 May 2019, Keybridge said that Mr Bolton represents the interests of Style Group. The Takeovers Panel had previously found that Mr Bolton has a substantial influence over the affairs of Style Group: *Takeovers Panel Reasons - Molopo Energy Limited 03R, 04R & 05R* [2017] ATP 12 at [254]‑[257].

## Confidential transaction proposed by Mr Bolton shortly after appointment as CEO

1. The following matters are agreed:
	1. in June 2019, Mr Bolton proposed to the Keybridge board that Keybridge enter into a transaction to purchase an interest in a media business (the parties have asked and I have agreed for current purposes that the identity of the business be kept confidential);
	2. on 26 June 2019, a majority of the Keybridge board resolved:
		1. to approve Keybridge undertaking a $5 million equity investment by way of the confidential transaction; and
		2. to authorise Mr Patton and Mr Bolton to approve and execute final investment documentation in relation to Keybridge's $5 million equity investment;
	3. on 28 June 2019, $5 million was transferred from Keybridge into the trust account of the law firm Ashurst. Those funds were paid out of Ashurst's trust account on 1 July 2019;
	4. on 30 June 2019, Mr Bolton told the Keybridge board that the confidential transaction had completed; and
	5. on 3 July 2019, Keybridge made an announcement to the ASX to the effect that the confidential transaction did not eventuate as contemplated by Keybridge.
2. I add that disclosing the identity of one of the persons involved on behalf of a counterparty to the confidential transaction might tend to disclose the transaction. Therefore in these reasons that person is designated 'confidential person'.
3. Those bare facts do not expose the concern expressed by each of Mr Johnson and Mr Khan about the confidential transaction and, in particular, what they perceived to be a failure to disclose aspects of the transaction to the market. Their concern is highly relevant to the circumstances in which the meetings of 10 July 2019 and 16 July 2019 were arranged and held.

## Summary - the meeting of 10 July 2019

1. It is the position of the plaintiffs that on 10 July 2019 a meeting of the directors was held and resolutions were passed to the following effect:
	1. Mr Bolton's appointment as CEO was suspended;
	2. Mr Patton was removed as chairperson of the directors of Keybridge with effect on 10 July 2019;
	3. Mr Johnson was elected as chairperson of the directors of Keybridge with effect on 10 July 2019; and
	4. changing the registered office of Keybridge.
2. Mr Patton contends that the meeting of 10 July 2019 was not a validly convened meeting of the directors because there was a failure to comply with various requirements of the constitution and an absence of proper notice. Accordingly, Mr Patton contends, the resolutions are invalid and void ab initio, such that even after 10 July 2019 Mr Patton remained the chair of Keybridge.

## The 15 July 2019 letter from the ASX

1. On 15 July 2019 George Tharian of the ASX wrote to Keybridge informing it that it must before commencing trading on 16 July 2019 inform the market about the dispute between the directors as to the identity of the chairperson and how the dispute was to be resolved.
2. That communication from the ASX led to further discussions between the directors and a meeting of directors was convened for the following day.

## Summary - the meeting of 16 July 2019

1. A meeting of the directors was held at 9.00 am AEST on 16 July 2019.
2. It is the position of the plaintiffs that at that meeting certain directors purported to pass resolutions to the following effect:
	1. immediately terminating Mr Khan's appointment as Mr Cato's alternate director; and
	2. then declaring that the resolutions made on 10 July 2019 were void and of no effect, except where they were unanimously passed by all four directors of Keybridge.
3. The plaintiffs say those resolutions/declarations were invalid. Unsurprisingly, Mr Patton contends that those resolutions/declarations were valid.

## Trading suspended by ASX

1. On 16 July 2019, the ASX suspended Keybridge's shares from quotation.

## Notices of general meeting

1. Bentley issued a notice pursuant to s 249F of the *Corporations Act 2001* (Cth) of a general meeting of Keybridge members on 1 August 2019. The Bentley notice proposed the following resolutions be considered at a General Meeting at 2.00 pm AEST on Wednesday, 25 September 2019 at The Park Business Centre, Ground Floor, 45 Ventnor Avenue, West Perth WA:
	1. that Mr Patton be removed as a director of Keybridge, with effect from the closure of the meeting;
	2. that Mr Kriewaldt be removed as a director of Keybridge, with effect from the closure of the meeting;
	3. that Mr Johnson (having retired at the meeting) be re‑elected as a director of Keybridge with effect from the closure of the meeting; and
	4. that Mr Cato (having retired at the meeting) be re‑elected as a director of Keybridge with effect from the closure of the meeting.
2. Style Group issued a s 249F notice of general meeting of Keybridge members on 23 August 2019. The Style Group notice proposed the following resolutions be considered at a General Meeting of the shareholders at 9.00 am AEST (7.00 am AWST) on Monday, 23 September 2019 at Level 7, 370 St Kilda Road, Melbourne VIC:
	1. that Mr Johnson be removed as a director of Keybridge, with immediate effect; and
	2. that Mr Cato be removed as a director of Keybridge Capital, with immediate effect.
3. In a rare moment of agreement by the directors, both general meetings have been postponed to 14 October 2019.

## Event of default notices

1. On 10 September 2019, Keybridge issued an event of default notice to holders of Keybridge Convertible Redeemable Promissory Notes, the default event relied upon being the suspension of trading in shares. The relevance of this evidence appears to be limited to underscoring the importance of a speedy resolution to the deadlock issues.

# Principles

1. It is convenient, before examining the facts relevant to the various meetings, to identify the relevant rules of Keybridge's constitution and the principles applicable to directors' meetings.

## Convening and conduct of directors' meetings

1. Ordinarily, less formality is required for a directors' meeting than a meeting of members of a corporation. In this case, rule 8.7(a) of the constitution provides that the directors may meet together to attend to business and adjourn or otherwise regulate their meetings as they decide.
2. There is no legal magic in the word 'board'. The legislation in fact does not use the term 'board'. A 'board meeting' is a meeting of directors: Magner ES, *Joske's Law and Procedure at Meetings in Australia*, 11th ed [26.10].
3. By rule 8.8 any director may call a meeting of the directors whenever they think fit. Further, a secretary must, if requested by a director, call a meeting of directors. A director could validly convene a meeting of directors by advising all other directors of the time and place of the meeting. By rule 8.9(a), notice must be given to each director or an alternate director where appointed.
4. By rule 8.9(b) a notice of a meeting may be given in person or by post or by telephone, fax or other electronic means. The notice must specify the time and place of the meeting. Notice may, if necessary, be given immediately before the meeting (I note that the fact that notice may be given immediately prior to a meeting is of some importance in this case).
5. The notice must be reasonable: *Toole v Flexihire Pty Ltd* (1991) 6 ACSR 455; *Re Homer District Consolidated Gold Mines; Ex parte Smith* (1888) 39 Ch D 546; and *Geelong School Supplies Pty Ltd v Dean* [2006] FCA 1404. In determining what is reasonable, the practice usually adopted by the board is a relevant consideration. If reasonable notice is not given to all directors the meeting is not valid unless all directors are present: *Barron v Potter* [1914] 1 Ch 895. What is required by way of notice may ultimately need to be resolved by reference to the nature of the business to be dealt with at a particular meeting.
6. By rule 8.9(b), the notice of the meeting need not state the nature of the business to be transacted at the meeting. This mirrors the position at common law: *Bell v Burton* (1993) 12 ACSR 325. Although it is not essential that a director be given notice of the business to be conducted at the meeting, it may be preferable and prudent to give notice of any special business: *La Compagnie De Mayville v Whitley* [1896] 1 Ch 788; *Toole v Flexihire*; and *Wilson v Manna Hill Mining Company Pty Ltd* [2004] FCA 912 at [26]. The rationale for the position that notice of the business to be conducted may not be required is that directors have a duty to the company to go to a meeting of directors when there is business to be done: *La Compagnie De Mayville v Whitley*.
7. The following extract from *Toole v Flexihire* addresses the two issues of notice of business and notice of calling of a meeting:

By the regulations, the directors may meet together for the dispatch of business, adjourn and otherwise regulate their meetings as they think fit: reg 79. For almost 100 years, it has been the law that, at a properly convened meeting, directors may transact all business within their powers though no notice has been given to the members of the board that special business is to be transacted: *Compagnie de Mayville v Whitley* [1891] 1 Ch 788; *Eastern Resources of Australia Ltd v Glass Reinforced Products (GRP) Pty Ltd* [1987] 2 Qd R 31 at 35.

A director may at any time and the secretary shall on the requisition of a director summon a meeting of the directors: reg 79. While there are specific time limits prescribed in the regulations in respect of the calling of meetings of the company, there is no time prescribed for the calling of meetings of the directors. In circumstances like that, the law requires that the notice be fair and reasonable; *Re Homer District Consolidated Gold Mines; Ex parte Smith* (1888) 39 Ch D 546. In deciding what is fair and reasonable the practice of the directors of the particular company is an important factor.

1. However, where the purpose of a meeting is notified, the meeting will be limited to addressing the specified business: *Dhami v Martin* [2010] NSWSC 770; (2010) 241 FLR 165.
2. In *Dhami*, the plaintiff's former wife (Mrs Dhami) circulated a notice of directors' meeting outlining the purposes of an upcoming meeting as being to 'discuss' an upcoming transaction. Based on the limited scope of the stated purposes, certain directors who considered Mrs Dhami's appointment invalid chose not to attend the meeting. Mrs Dhami and another director who attended the meeting passed a resolution which gave Mrs Dhami authority to act alone on the company's behalf in relation to that transaction.
3. Barrett J held that the resolution was void. Whilst acknowledging the general principle that directors should come together whenever called on notice of reasonable length and without any expectation of being told why they are being summoned to a meeting, his Honour held that by notifying the meeting's purpose Mrs Dhami went beyond the legal requirement and thereby brought different considerations into play, being that a director receiving the notice would have thought that the director summoning the meeting had done so with a view exclusively to the stated purposes (at [48]).
4. His Honour states:

[51] Where there is a requirement that the notice convening a meeting state the purpose of the meeting or the business proposed to be transacted, the position is as stated in *McLure v Mitchell* (1974) 24 FLR 115 at 140:

'The purpose of a notice of a meeting is to enable persons to know what is proposed to be done at the meeting so that they can make up their minds whether or not to attend. The notice should be so drafted that ordinary minds can fairly understand its meaning. It should not be a tricky notice artfully framed (*Henderson v Bank of Australia* (1890) 45 Ch.D. 330 at 337)'.

[52] The position must be the same where the person summoning the meeting chooses to state what is proposed to be done at the meeting, even though there is no requirement that he or she do so and the meeting would have been properly convened by a notice that did not state a purpose. A statement of purpose actually included by the summoning person, whether or not required, is put forward in order that those entitled to attend can decide whether or not to do so. Indeed, in the context of a board of directors where there is no requirement that the proposed business be stated, there is no other conceivable reason for a statement of purpose. The implied message conveyed by the statement of purpose and its inclusion is that the meeting is being summoned not to do anything and everything that the board of directors has power to do and may decide to do but for the particularly defined and limited purpose notified. The need for the statement to convey a fair description of the purpose on which a decision to attend or not may reliably be based is therefore both emphasised and obvious.

[53] Directors who propose that a company's members (as distinct from directors) take a particular course of action are under a duty to make full disclosure of all facts within their knowledge which are material to enable the members to determine what action to take. This duty 'arises as part of the fiduciary duties of the directors to the company and its members in relation to proposals to be considered in general meeting'; and information must be given 'such as will enable members to judge for themselves whether to attend the meeting and vote for or against the proposal or whether to leave the matter to be determined by the majority attending and voting at the meeting: *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452 at 466 per Black CJ, von Doussa J and Cooper J.

[54] An individual director convening a meeting of the board under a provision such as Ace's article 89 does so in his or her capacity as a director. The constitution confers the convening power on a single director in the obvious expectation that any director choosing to exercise it will, as in all other matters, act in the interests of the company. The power is a fiduciary power. The interests of the company require, in the particular context, that the steps taken be such as to facilitate collective deliberation and informed decision-making of the board as a whole. The power to convene given to each director is not a personal proprietary right to be used for the director's own ends. It is a power to facilitate the obtaining of an expression of the will of the board of directors.

[55] The notice given by Mrs Dhami on 21 May 2010 was such as to engender in its recipients the expectation that, in relation to Toukley, there would be no more than discussion at the meeting of 26 May 2010. No proposed resolution was set out. Nothing beyond the exchange of views that discussion entails was foreshadowed. Knowing that Mr Martin and Mrs Martin had been given that expectation and that they would almost certainly have objected to any decision that Mrs Dhami be invested with Ace's authority to act alone in any way in relation to Toukley, the two new directors present purported to cause the company to confer that authority on her. It may be inferred (and I find) that Mrs Dhami had it in mind to seek the authority when she issued the notice of 21 May 2010, assuming that circumstances at the meeting seemed conducive to success in that endeavour. Having thus abstained from telling the other directors (at least Mr Martin and Mrs Martin) what she intended, Mrs Dhami then pressed ahead with the proposal in their absence, knowing that they would almost certainly have objected and quite likely attended to vote against if aware of what was to transpire. The notice of meeting given by Mrs Dhami was thus misleading.

[56] The consequence of a breach of duty in the form of materially misleading conduct in the convening of a meeting is that the consequent unfairness of the convening process infects the proceedings as a whole or, at least, the parts of it affected by the misleading conduct, which are therefore void. This is because the apparent decision is not a properly informed decision. That then is the fate of the purported appointment of Mrs Dhami as representative at the meeting of the directors of Ace on 26 May 2010.

1. By rule 8.7(b), a meeting may be conducted by contemporaneous telephone call or other electronic means of sufficient directors to constitute a quorum. By rule 8.7(c) such a meeting is taken to be held at the place where the chairperson is or decides, as long as at least one of the directors involved was at that place for the duration of the meeting.
2. Where the company's constitution provides for the number of directors to constitute a quorum, that number must be present. If the requisite quorum is not present, the meeting is irregular and cannot transact business, although lack of a quorum may comprise a procedural irregularity that can be remedied (eg s 1322(1) and s 1322(2) of the *Corporations Act*). In the case of Keybridge, by rule 8.10(b), unless the directors decide differently, two directors constitute a quorum (and no quorum issue arises on the facts in this case).
3. By rule 8.12, if a quorum is present, then the directors may exercise any powers and discretions vested in them as directors. Questions arising at a meeting must be decided by a majority of votes cast by the directors present and entitled to vote. If the votes are equal, then the chairperson has a casting vote in addition to their deliberative vote (unless there are only two directors present, in which case there is no second casting vote and if the votes are equal the vote is taken to be lost).
4. I add that whist it will obviously be convenient for directors to make decisions at meetings called in accordance with the rules provided by the constitution so that procedural advantages might apply (for example as to quorum and casting votes), decisions may also be made by directors reaching concurrence at an informal meeting and provided they are acting in their capacity as a director: *Poliwka v Heven Holdings* (1992) 7 ACSR 85 at 90‑91; *Re East Norfolk Tramways Co* [1877] 5 Ch D 963 at 966‑967.
5. The following extract from *Swiss Screens (Australia) Pty Ltd v Burgess* (1987) 11 ACLR 756 at 758 is instructive:

To my mind any event, even most fleeting, in which two directors who are married to each other and are the company's only directors reach concurrence in taking some course in the company's affairs can be part of their management of the business of the company, and can be described with accuracy as a meeting of the directors and as a proceeding at such a meeting. In the course of human affairs it is not to be expected that a recognisable meeting would often take place in which somebody took the chair, there was a call to order, a resolution was made, seconded, debated and voted on. What does seem to me to be essential is that they should both concur in some decision in the management of the business of the company. If they do, and the event is recorded in a minute which accurately states what they concurred in as their decision, the meeting and the minute are no less effectual because the minute is formally expressed and appears to be an account of a much more solemn event than in fact took place.

1. The principle is not limited to directors who are married to each other and has been applied more broadly. Relevant cases are usefully collected in *Mercanti v Mercanti* [2016] WASCA 206; (2016) 50 WAR 495 at [175]‑[178].

## The chairperson

### Rules

1. By rule 8.11(a) of the constitution, the directors may elect a director to the office of chairperson of directors and may elect one or more directors to the office of deputy chairperson of directors. The directors may decide the period for which those offices will be held.
2. By rule 8.11(b), if present within 10 minutes after the time appointed for the meeting and willing to act, the chairperson is entitled to preside as chairperson at a meeting of directors. If there is no chairperson, or the chairperson is not present within 10 minutes after the time appointed for the meeting or the chairperson is not willing or declines to act as chairperson, then the directors present must elect one of themselves to chair the meeting.
3. By rule 7.5(a), the chairperson of directors is also entitled to preside as chairperson at a general meeting.

### Role

1. In general, it is an indispensable part of any meeting that a chairperson should be appointed and should occupy the chair. In the absence of some person exercising procedural control over a meeting, the meeting cannot proceed to business. However, that may be qualified where all present are unanimous or in small meetings where procedural control may pass from person to person according to who for the time being is allowed to have such control. But, there must be some person expressly or by acquiescence permitted by those present to put motions to the meeting so as to enable the wish or decision of the meeting to be ascertained: *Colorado Constructions Pty Ltd v Platus* [1966] 2 NSWR 598 at 600; and *Kelly v Wolstenholme* (1991) 4 ACSR 709 at 712‑713.
2. The duties of the chairperson were summarised (in the context of a meeting of members) in *Re Ryde Ex-Services Memorial and Community Club Ltd (Administrators Appointed)* [2015] NSWSC 226 at [104]‑[108] as follows:
	1. to preserve order, and to take care that the meeting under his or her control is conducted in a proper manner, in order to facilitate the sense of the meeting being properly ascertained on any question properly before the meeting;
	2. to regulate proceedings, so as to give all persons entitled a reasonable opportunity of voting;
	3. to act in a way calculated to ensure that the true will of the meeting is ascertained, rather than in pursuit of some personal desire or preference or in a manner designed to achieve some policy objective of another body, taking care to create a convenient forum in which the relevant constituency can consult together and exercise their voting rights in an orderly and constructive way; and
	4. to act impartially.
3. A collection of authorities regarding the chairperson's responsibilities both more generally and in respect of meetings of directors can be found in the judgment of Austin J in *Australian Securities and Investments Commission v Rich* [2003] NSWSC 85; (2003) 174 FLR 128 from [51].

### Replacement of chair by election, 'choosing' or acquiescence

1. In this case, it is alleged that to the extent Mr Patton was chair of the meeting of 10 July 2019, he left during the course of the meeting (by hanging up from the teleconference), and resolutions were passed after he left. A question therefore arises as to how and whether he was replaced for the duration of the meeting.
2. At common law, if the chairperson neglects or fails in his or her duty to proceed to business or put a motion to the meeting, another person may assume procedural control with the acquiescence of those present and put the motions to the meeting so as to enable the decision of the meeting to be ascertained: *National Dwelling Society v Sykes* [1894] 3 Ch 159 at 162.
3. In small meetings, the decision of the meeting may be ascertained by evidence of those present as to the wish or decision of the majority on the motion in question. Such a resolution is valid even if the appointed chairperson fails to put the motion to a vote at the meeting: *Toole v Flexihire* at 461.
4. Where a constitution permits the directors to 'choose' a replacement chair of a meeting, then such course may be apparent by acquiescence: *Kelly v Wolstenholme.* Where the constitution provides (as in this case) that the directors may elect a replacement, a question arises as to whether 'elect' has the same meaning as 'choose' and so whether the principles of acquiescence apply: *Woonda Nominees v Chng* [2000] WASC 173 at [36].

## Termination of appointment of an alternate director

1. At the meeting of 16 July 2019, Mr Patton and Mr Kriewaldt purported to terminate the appointment of Mr Khan as alternate director for Mr Cato, before proceeding to move further resolutions on which Mr Khan was therefore prevented from voting. As Mr Cato had no knowledge of the purported removal of his alternate and was not present at the meeting, he was also not able to vote on the subsequent resolutions.
2. This raises the question of the proper construction of the rules insofar as they provide for the appointment and removal of alternate directors, and also raises the question of the proper construction of s 203E of the *Corporations Act*.
3. I will address this construction issue in detail below.

## The statutory scheme to rectify irregularities - s 1322

1. The parties raised the question of relief under s 1322(4) of the *Corporations Act* with respect to the meetings of 10 July 2019 and 16 July 2019.
2. Section 1322(2) and (3) of the *Corporations Act* provide:

(2) A proceeding under this Act is not invalidated because of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.

(3) A meeting held for the purposes of this Act, or a meeting notice of which is required to be given in accordance with the provisions of this Act, or any proceeding at such a meeting, is not invalidated only because of the accidental omission to give notice of the meeting or the non-receipt by any person of notice of the meeting, unless the Court, on the application of the person concerned, a person entitled to attend the meeting or ASIC, declares proceedings at the meeting to be void.

1. 'Proceeding' is widely defined and includes a meeting: *Australian Hydrocarbons NL v Green* (1985) 10 ACLR 72. 'Proceeding' and 'procedural irregularity' are defined in s 1322(1):

(1) In this section, unless the contrary intention appears:

(a) a reference to a proceeding under this Act is a reference to any proceeding whether a legal proceeding or not; and

(b) a reference to a procedural irregularity includes a reference to:

(i) the absence of a quorum at a meeting of a corporation, at a meeting of directors or creditors of a corporation, at a joint meeting of creditors and members of a corporation or at a meeting of members of a registered scheme; and

(ii) a defect, irregularity or deficiency of notice or time.

1. The purpose of s 1322 is to avoid a person's substantive rights being eroded as a result of a procedural irregularity. The provision is remedial and should be applied liberally: *NRMA Ltd v Gould* (1995) 13 ACLC 1518 at 1520-1521.
2. Section 1322(4) provides for orders which may be made, and s 1322(6) identifies the pre‑conditions that must be met before an order may be made. They provide:

(4) Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:

(a) an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation;

(b) an order directing the rectification of any register kept by ASIC under this Act;

(c) an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure of a kind referred to in paragraph (a);

(d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding;

and may make such consequential or ancillary orders as the Court thinks fit.

…

(6) The Court must not make an order under this section unless it is satisfied:

(a) in the case of an order referred to in paragraph (4)(a):

(i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;

(ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or

(iii) that it is just and equitable that the order be made; and

(b) in the case of an order referred to in paragraph (4)(c) - that the person subject to the civil liability concerned acted honestly; and

(c) in every case - that no substantial injustice has been or is likely to be caused to any person.

# The events

## Witnesses

1. The plaintiffs called Mr Johnson, Mr Khan and Mr Ho. Mr Johnson gave the impression of attempting to provide his evidence accurately but he did not have good recall of the relevant events and his evidence as to some matters was inherently improbable. In particular, he denied knowledge of certain events (Mr Khan's plan to potentially remove Mr Patton as chairman) in circumstances where he was clearly on notice. Either he failed to have sufficient regard to events at the time or he has sought to understate his knowledge when giving evidence. I am of the view, based on his evidence as a whole, that he sought to understate his knowledge where he considered it helpful to his case to do so.
2. Mr Khan is clearly a determined person who gave evidence in an emphatic although sometimes self‑serving manner. I have no doubt that he held genuine concerns about Mr Bolton's involvement in Keybridge, the confidential transaction and the whereabouts of the relevant $5 million. He was entitled to ask questions about that transaction and receive information. However, his evidence in particular areas lacked credibility (addressed more particularly below).
3. Mr Ho gave his evidence in a straight-forward manner, responding objectively and unemotionally to questions. I have accepted his evidence.
4. Mr Patton was not a good witness. He used the opportunity in the witness box to provide a time consuming narrative of events (not all of which were relevant), coloured with gratuitous comments and opinions about others (for example, diminishing Mr Johnson's stated concerns about disclosure by asserting he 'parrots' Mr Khan) and unprompted high praise of Mr Bolton. He avoided answering questions directly. I do not consider he deliberately sought to mislead or obfuscate, but I am inevitably led to question the objectivity and accuracy of his evidence. Therefore, I have rejected aspects of his evidence, as detailed below.
5. Mr Kriewaldt, an experienced lawyer, gave his evidence in a careful although guarded manner. As appears below, I have formed the view that certain steps taken by Mr Patton and Mr Kriewaldt relating to the 16 July 2019 meeting were not justified. I have generally accepted Mr Kriewaldt's evidence as to the practices of the directors relating to the conduct of directors' meetings. Such evidence was inherently credible and largely consistent with that of Mr Ho.
6. I should add that whilst I make findings critical of Mr Johnson, Mr Khan, Mr Patton and Mr Kriewaldt, I make no findings of dishonesty. I am further conscious of the fact that Mr Khan is not a party to these proceedings.
7. Having observed the witnesses give evidence, it is clear that their personalities and allegiances have shaped the events that have led to this urgent hearing.

## As to meetings of directors generally

1. During the period between late June and early July 2019 there was a flurry of meetings between the directors regarding the confidential transaction.
2. It is useful to note at this point that the evidence of Mr Ho and Mr Kriewaldt was that Keybridge's usual practice was to distinguish between what the directors described as formal meetings of the board and *ad hoc* meetings between directors.
3. Mr Kriewaldt's evidence was that 'official board meetings' were usually preceded by an electronic calendar invitation and a detailed agenda including supporting papers on all matters currently before the board, notwithstanding that the Keybridge constitution does not require it. Such meetings would open with formalities such as the chairperson noting the time of opening of the meeting and ascertaining a quorum was present, and declarations of interests by directors. In contrast, '*ad hoc* meetings' were in general 'restricted to a particular issue with which all of the directors participating were fully aware' (often because of previous meetings) and, in his experience, did not deal with issues other than 'the matters for which each meeting was convened'. Mr Kriewaldt said that if decisions reached at those meetings required a resolution of the board, any directors not the subject of a conflict and not present at the meeting would be telephoned so that they could join the meeting or the issue would be deferred until all directors were available. It is implicit in Mr Kriewaldt's evidence (which was not challenged) that directors were on notice of the purpose of such *ad hoc* meetings.
4. Mr Ho's evidence was that *ad hoc* meetings were initially proposed by a director or Mr Ho on a matter he considered appropriate for the directors' consideration. Such meetings were typically called when a director sent an email to the other directors stating that they want a board meeting to occur. Mr Ho would then confirm the scheduled date, time, and teleconference details of the meeting in an email before sending a calendar invitation to the directors.
5. Mr Ho also stated that 'discussion meetings', which were meetings between directors that were not considered to be board meetings, were scheduled in the same way as *ad hoc* meetings save that the email and calendar invitation would describe the occasion as a 'discussion' and not a 'meeting'. At such meetings, handwritten notes would be taken but typewritten minutes would not be made after the meeting.
6. Mr Patton's evidence was that any email proposing a meeting which was to be a board meeting specified that this was the case and provided a description or agenda of the business to be discussed at the meeting. It is apparent that Mr Patton was referring to the formal board meetings described by Mr Ho and Mr Kriewaldt. In oral evidence Mr Patton acknowledged that there were *ad hoc* meetings but did not address the processes associated with them. To the extent Mr Patton may have been suggesting that even *ad hoc* meetings were convened utilising the formal processes of an agenda, then I would reject that evidence and prefer the evidence of Mr Kriewaldt. In general I prefer the evidence of Mr Kriewaldt to that of Mr Patton where there is inconsistency.
7. All meetings, whether formal or *ad hoc,* were conducted by telephone conference.

## 30 June 2019

1. On 30 June 2019, Mr Bolton emailed the board of Keybridge advising that the confidential transaction had completed. The email attached a draft 'Announcement to ASX', which read:

Keybridge is pleased to advise that after a lengthy and competitive sale and due diligence process, it has invested $5 million into the Australian media sector. The investment is via a 100% owned trust and gives Keybridge exposure to a minority 16.67% interest in the ordinary and preferred equity in an unlisted Australian regional media business.

1. Mr Khan, Mr Johnson and Mr Kriewaldt responded that they did not consider the disclosure to be adequate, whilst Mr Patton and Mr Bolton considered the disclosure to be adequate. Following comments from Mr Johnson, Mr Patton and Mr Bolton, Mr Khan stated:

I think we are apart in terms of disclosure thresholds as I don't believe the announcement is close to sufficient disclosure.

Hence whilst we sort this out we should go into a trading halt. Also for the sake of clarity this is not a q of ASX deciding.

If we ask we will get it in these circumstances.

## 1 July 2019

1. On 1 July 2019, Mr Khan made a request to the ASX that Keybridge go into a trading halt shortly after the market opened. That request was granted.
2. Mr Bolton was apparently unhappy at that outcome, sending an email to the directors stating that:

I maintain the view that there was no need for a halt at the time the halt was requested, and there remains no need.

The deal remains uncertain and confidential and there is nothing to announce. At this stage we will be getting our money returned to us, however I am trying to negotiate an alternative structure that may meet the partners' requirements.

In my view the ASX should be notified in the morning that the company should not be in trading halt and that the company did not request the trading halt as announced yesterday. The letterhead of the company and signature of the company secretary were used without authority and the company is reviewing the matter.

I simply cannot fathom how we are in halt without the advance consent of the board.

1. Clearly this information upset Mr Khan, who replied to Mr Bolton's email as follows:

Gents,

I refer to the email below from Nick.

It appears to me that he has deliberately misled the board.

There is no doubt that he categorically confirmed to the board (and through the market announcement he prepared, further confirmed) that there was an agreement in place.

It further appears with the benefit of hindsight that he did not disclose to the board that the basis of the agreement reached with the other parties to the transaction was that there would be no disclosure by Keybridge of the transaction in the manner required by the Listing Rules.

That is why he drafted an announcement confirming the agreement but purposely did not disclose any details of the transaction such as the counter parties or even something as basic as the name or details of the assett [sic] we acquired. His only reference being that of a 'media acquisition' clearly demonstrates a complete lack of understanding of the listing rules of the ASX.

Having been caught out (and with the ASX requiring proper disclosure on the one hand and the other partners requiring minimal disclosure on the other) he is now seeking to somehow disavow his direct statements and actions and posit a position that there was no agreement.

His statement in his email that 'The deal remains uncertain and confidential and there is nothing to announce' beggars belief and is inconsistent and irreconcilable with his clear statements and the market announcement he prepared.

He has continued to maintain this position until it has become clear that a full disclosure is required whereupon he has incredibly reversed his position and stated that now there is no agreement.

He is simply now making things up as he goes along and I have no faith in relying on him to understand exactly what has happened or what our position is.

The fact that we as a board are being told totally contradictory statements in the face of a bid and the potential for the triggering (or not) of a defeating condition makes this situation even worse.

The issue of the Trading Halt is simply a diversion.

This was a time sensitive matter based on his own statements as CEO that an agreement had been reached and he had put forward a market announcement confirming this very point on Sunday.

This announcement should have been settled before the market opened on Monday but due to his wriggle actions in trying to minimize disclosure, it was not settled.

The market had opened and trades were already occurring. There is simply no argument that a trading halt was warranted in the circumstances and as 3 out of 4 directors were involved in this process and 2 of the 3 determined that it was the correct course to seek a trading halt, this was actioned.

The fact that Jeremy chose not to or could not participate is a matter of his own election or circumstances but this should not and did not prevent the company from taking the immediate and appropriate time sensitive action in seeking a trading halt.

The ASX has already queried why the halt was not requested before market opened and to have waited would have made this situation worse.

As outlined by me earlier today, there are clear steps the company needs to take to get to the bottom of what he has been up to. This is the course the board should pursue.

I will also be calling a board meeting to seek his suspension as CEO till this fiasco can be properly investigated.

1. I interpose to highlight that it is not necessary for me to make any findings about the conduct of Mr Bolton, or indeed any other person, with respect to the level of disclosure to the market of the confidential transaction, the content of the ASX guidelines on disclosure, the status of the confidential transaction or its commercial viability. Nor would it be appropriate for me to address those matters, particularly in circumstances where Mr Bolton is not a party to these proceedings. However, I refer to Mr Khan's email because it provides important context for his subsequent actions. As I have already noted, I proceed on the basis that Mr Khan genuinely believed that there were issues with the commercial transaction and associated disclosure issues.

## Meeting of 2 July 2019

1. On 2 July 2019 at 5.00 pm AWST, the directors and Mr Bolton held a meeting. At that meeting, Mr Bolton said words to the effect that he could come up with an alternative to the original confidential transaction which would be acceptable to the other consortium partners.
2. Mr Patton, Mr Kriewaldt and Mr Johnson voted to allow Mr Bolton a further week (i.e. until 9 July 2019) to come up with an alternative transaction, after which Keybridge would ask for the return of its $5 million.

## The draft announcement and the meeting of 3 July 2019

1. It is clear that Mr Khan (at least) had in mind the potential replacement of Mr Patton as chair by at least 3 July 2019. On that date he circulated by email a draft market announcement to Mr Ho and Mr Johnson that read as follows:

**MARKET ANNOUNCEMENT**

**BOARD AND MANAGEMENT CHANGES**

Keybridge Capital Limited (ASX: KBC) (**Keybridge**) provides the following update:

**Board**

The Board has resolved to remove John Patton as Chairman with immediate effect.

The Board has appointed William Johnson as Chairman in his place.

The Board will now seek to appoint an independent Chairman for Keybridge at which time Mr Johnson will offer his resignation as Chairman of Keybridge. Keybridge will seek a suitably qualified candidate for the position of Chairman.

In conjunction with the appointment of an independent Chairman, the Board will now invite other major shareholders (who do not currently have Board representation) to nominate a representative to join the Board. The Board will then seek to appoint an appropriately qualified and experienced nominee as a Director.

**Chief Executive Officer (CEO)**

The Board has terminated the employment of Nicholas Bolton as CEO with immediate effect. The Company will pay Nicholas Bolton a termination payment of $110,000 pursuant to the terms of his employment agreement (being 25% of his full-time salary of $440,000).

The Board will look to appoint a new CEO or Chief Investment Officer after an executive search process.

**Corporate Matters**

The Board has determined to engage an independent law firm to investigate a number of transactions entered into by the Company to determine compliance with the Listing Rules of the Australian Securities Exchange Ltd and the Corporations Act. The company will advise the market of the outcome of those investigations when they are complete.

1. The board also met for a 'Board Only Teleconference' in the afternoon of 3 July 2019. Although there are no typewritten minutes of that meeting, Mr Ho's handwritten notes indicate that the meeting commenced at 1.01 pm AWST, and that initially in attendance were Mr Khan, Mr Johnson, Mr Patton, and himself, whilst Mr Kriewaldt joined some minutes later. I note this meeting because the absence of Mr Kriewaldt for a period at this meeting is relied upon by the plaintiffs as rebuttal to any argument that the events of the 10 July 2019 meeting were pre‑planned.

## Events of 10 July 2019

1. During the course of the early hours of 10 July 2019 there were a number of emails passing between the directors (including Mr Khan), Mr Bolton and Mr Ho, all of which concerned the confidential transaction, the associated $5 million and any proposal to address risk associated with that payment.
2. On 10 July 2019 at 8.16 am AWST and following the majority of those exchanges, Mr Khan sent an email to Mr Cato, Mr Johnson, Mr Patton, Mr Kriewaldt and Mr Ho. The email was entitled '$5m loan to [confidential person]' and read:

Gents,

Can we please have a quick board meeting this afternoon with out Nick, I'm thinking around 3:45pm WST.

Dial in details to be sent by Victor.

Regards,

Farooq

1. Mr Khan's evidence was that by sending this email, his sole intention was to request Mr Ho to call a board meeting to ascertain what was going on in relation to the confidential transaction and the recovery of the $5 million, as over a week had passed since the money had been paid out by Keybridge.
2. This email was followed by a number of emails between the board, Mr Bolton, and Mr Ho, all of which concerned the directors' competing views on the confidential transaction. There is some difficulty in ascertaining which emails are in response to which, as they appear to be combined in one document in chronological order rather than according to particular email chains. This is borne out by the fact that in one email, Mr Bolton appears to be replying to an email which he did not in fact receive.
3. Regardless, it is clear that on 10 July 2019 at 12.14 pm AWST, Mr Ho sent an email to Mr Cato, Mr Johnson, Mr Patton, Mr Kriewaldt and Mr Khan with dial in details for a meeting at 3.45 pm AWST. The email was headed 'KBC Board only Meeting - Wednesday, 10 July 2019 at 1545 WST / 1745 EST' and read:

Proposed Board only teleconference meeting:

**Teleconference OZLINK Dial-in details …**

1. Mr Ho's email then went on to provide dial-in details. I am satisfied that this email was, if not directly in response to Mr Khan's email above, in the same chain as that email. Mr Ho's evidence was that when he called this meeting, he did not know that Mr Khan would move a resolution to remove Mr Patton as chairperson at the meeting.
2. The evidence is that all the directors saw this invitation. Mr Johnson understood it to be calling a board meeting regarding the confidential transaction. Mr Patton understood the email to be requesting a board-only discussion to talk frankly about the confidential transaction.
3. Mr Kriewaldt's evidence was that he was aware of the meeting and its time, but chose not to attend the meeting because he was on a family holiday on the period 10 July to 15 July 2019 inclusive and so was tired from driving his family to their destination and busy settling his family into their accommodation, and because he believed that if any matter requiring a board resolution arose he would be telephoned to see if he could participate in accordance with the board's usual practice. I infer from that evidence that he was satisfied that telephone contact could be made with him if required. He stated that he had told Mr Patton about this holiday, in addition to mentioning the holiday broadly to people with whom he was dealing in the previous week, and so believed that the other directors were aware of this holiday. There was no evidence that Mr Khan, Mr Johnson or Mr Ho were aware that Mr Kriewaldt was on holiday.

### Initial meeting

1. On 10 July 2019 at 3.45 pm AWST, Mr Johnson, Mr Patton, Mr Khan and Mr Ho dialled into the meeting. Mr Kriewaldt did not dial into the meeting. Mr Johnson, Mr Khan and Mr Ho were together in Bentley's boardroom in Perth. Mr Patton said he was at the National Tennis Centre in Melbourne, picking up his children.
2. Mr Patton's evidence was that he did not consider this meeting to be a board meeting. Instead, he considered this to simply be another one of a series of 'repetitive' telephone conversations about the confidential transaction. He said that at the time that he dialled into the call, it was very windy and so it was difficult for him to hear what was said on the call, or who was on the line. He gave conflicting evidence about aspects of the call. In his affidavit he said that present on the call were Mr Khan, Mr Johnson and Mr Ho. In oral evidence he said that he was aware that Mr Khan was on the line but could not tell who the other parties were. There was no suggestion he made it known to other participants that he had difficulties with the phone line.
3. The meeting was short (Mr Patton suggested it went for five minutes). Mr Patton said that after some brief introductory remarks, he undertook to contact Mr Bolton to discuss the confidential transaction with him and obtain further information. Mr Johnson, Mr Patton and Mr Khan then agreed to adjourn until 5.00 pm AWST.

### During the adjournment

1. During the adjournment, Mr Patton contacted Mr Bolton and discussed the confidential transaction with him.
2. On 10 July 2019 at 4.11 pm AWST, Mr Ho sent an email to Mr Cato, Mr Johnson, Mr Patton, Mr Kriewaldt and Mr Khan stating that:

Meeting was adjourned to 5.00 pm AWST so that Mr Patton could contact Mr Bolton and get an update regarding the $5m [confidential transaction].

1. After this email was sent, Mr Khan decided that he would attempt to remove Mr Patton as chairperson. His evidence was that Mr Patton's adjournment of the meeting was the 'straw that broke the camel's back', and that he formed the view that removing Mr Patton as chairperson was the best way to protect shareholders. He drafted a note containing the draft resolutions he intended to put forward: to remove Mr Patton as chairman; to appoint Mr Johnson as chairman; to suspend Mr Bolton as CEO; to appoint an independent law firm to investigate the confidential transaction and whether it could be reversed; and to issue an ASX announcement of the resolutions.
2. Mr Johnson's evidence was that it came as a surprise to him over the adjournment period that Mr Khan was proposing to remove Mr Patton as chairperson, as Mr Khan had not discussed the matter with him beforehand. Mr Johnson claimed to not recall receiving the 3 July 2019 email from Mr Khan attaching the draft market announcement. I find that Mr Johnson was on notice prior to 10 July 2019 that Mr Khan had a plan (that may or may not be implemented) to remove Mr Patton as chairperson. Mr Ho's evidence was that in the days of the aftermath of the trading halt discussions, Mr Khan had discussed with him the possibility of removing Mr Patton. However, Mr Ho said that although he understood during the course of the adjournment that there was a possibility Mr Khan might put the resolution, he did not know that he in fact would do so. It is in any event apparent from the draft announcement of 3 July 2019 that Mr Khan had raised the potential for such a course with both Mr Johnson and Mr Ho before this time.
3. None of Mr Johnson, Mr Khan nor Mr Ho disclosed any knowledge of Mr Khan's proposal to remove Mr Patton to Mr Patton or Mr Kriewaldt prior to the resumption of the meeting.
4. Mr Kriewaldt acknowledged that he received the 4.11 pm AWST email from Mr Ho about the adjournment of the meeting although he could not recall whether he read it before or after the meeting.

### The reconvened meeting

1. The meeting reconvened at 5.01 pm AWST. Mr Patton said that they should allow some time for Mr Kriewaldt to join the call, but Mr Khan said that 'we should just get on with things'. Mr Patton relayed his conversation with Mr Bolton to the other participants on the call. Shortly afterwards, Mr Khan stated that he had lost confidence in Mr Patton as chairman and proposed a resolution immediately removing him from that position.
2. Mr Patton objected to this resolution being put. On his evidence, he told Mr Khan that the call was not a board meeting and so it was not the proper forum for such a resolution, and so Mr Khan would have to wait for a properly convened meeting to put the resolution. According to Mr Khan, Mr Patton additionally stated that Mr Khan could not put such a resolution and that he lacked authority to seek Mr Patton's removal as chairman, and protested that Mr Kriewaldt was not in attendance. Mr Khan said in evidence that Mr Patton's greatest objection was that the proposed resolution was not one that should be put at the meeting. The draft minutes of the meeting written by Mr Ho record that Mr Patton protested that the meeting was not properly convened; that there was inadequate notice given; and that Mr Kriewaldt was in country Victoria with limited mobile phone coverage.
3. Mr Khan said that he told Mr Patton that he disagreed, that the meeting was validly convened because notice had been given and a quorum was present, and it was appropriate for such a resolution to be put. Mr Patton's evidence is that Mr Khan ignored his protests. In any event, Mr Khan then said that he voted in favour of Mr Patton's removal as chairman and the appointment of Mr Johnson to that position, and asked Mr Johnson how he voted on the resolution. Mr Johnson then voted in favour of that resolution.
4. Mr Khan then asked Mr Patton how he voted on the resolution. Mr Patton refused to vote. His evidence was that he reiterated that the call was not a valid board meeting and so it was not appropriate to consider a resolution such as the one proposed by Mr Khan. Mr Khan's evidence was that Mr Patton rejected the basis of the resolution being put and would not vote, and stated words to the effect that he could not be removed as chairman and Mr Khan and Mr Johnson had no authority to remove him. Mr Khan advised that as Mr Patton had not indicated his voting intention, the minutes would reflect that he abstained from voting on the resolution.
5. Mr Patton hung up the call at 5.08 pm AWST.
6. After Mr Patton hung up the call, Mr Khan proposed and voted for a number of other resolutions and Mr Johnson voted in favour of each of them. By those resolutions, Keybridge appointed Mr Johnson as chairman; tasked Keybridge's Remuneration and Nomination Committee to consider and recommend a candidate to act as an independent chairman to take over from Mr Johnson; suspended Mr Bolton as CEO; undertook to recover the funds advanced under the confidential transaction; engaged a law firm to conduct an investigation into the confidential transaction; changed the registered office of the company; and authorised the directors to lodge an ASX announcement to advise of those matters.

## Between 10 July 2019 and 16 July 2019

1. On 10 July 2019, after the meeting, Mr Patton sent an email to Mr Johnson, Mr Kriewaldt, Mr Khan, Mr Cato and Mr Ho in which he stated:

I am most disappointed by the conduct displayed on the teleconference earlier tonight. It was not a properly convened board meeting, insufficient notice was provided and not all parties were able to attend. As a consequence, there is no standing to the matters ventilated and there were no resolutions passed.

…

The Board agreed, in good faith, to Simon's request that Farooq acts as his alternate whilst he was overseas on holiday. The attempted stunt tonight is beyond a pale and speaks volumes.

Going forward, the Board will not meet unless an agenda is circulated before hand and appropriate notice is provided to all directors. That is how an effective Board functions.

As a consequence, there is no standing to any of the matters ventilated on the teleconference this evening.

Kind regards

John

1. On 10 July 2019 at 8.59 pm AWST, Mr Johnson wrote an email to Mr Bolton to advise that he had been suspended as CEO. Mr Patton then wrote the following:

I thought I'd seen it all, obviously not. Today's teleconference was not a board meeting. I do not recall opening any meeting, nor running through any declarations of interest/conflicts as is my usual custom for Board meetings. Inadequate notice was provided and no agenda was set. Jeremy is also in a remote location, on leave, with patchy reception.

The teleconference was to discuss [the confidential transaction], as per my earlier email. This was not addressed. Your actions are unlawful and unconstitutional. I must say I had expected more from you William. If you make any public announcements, vigorous legal action will be taken, this is a circus.

To be clear, William, you are not the Chairman and I strongly suggest you reconsider your conduct tonight.

1. On 11 July 2019 Keybridge made a market announcement via the ASX. That announcement relevantly read:

The Board has resolved to remove John Patton as Chairman with effect on 10 July 2019. Mr Patton continues as a Non-Executive Director of the Company.

The Board has appointed Non-Executive Director, William Johnson, as Chairman with effect on 10 July 2019.

The Board will now seek to appoint a suitably qualified and experienced independent Chairman for Keybridge at which time Mr Johnson will offer his resignation as Chairman.

**Registered Office**

The Board has resolved to change its Registered Office to the Company Secretarial Office with effect on 10 July 2019 …

1. Further board meetings were held on 12 July 2019 and 14 July 2019 to discuss the confidential transaction. As there was a dispute as to who was chairperson of the directors, the directors agreed that Mr Kriewaldt would chair those meetings on the condition that he agreed not to exercise a casting vote.
2. On 15 July 2019, Keybridge received correspondence from the ASX. That correspondence read:

I have conveyed KBC's broader situation to ASX Management which has advised that ASX expects that KBC will release an announcement to the market before commencement of trading tomorrow. This announcement must inform the market about the current dispute within board (specifically in relation to the appointment of KBC's Chairman) and KBC's expected process for resolving the matter (e.g. obtaining legal advice etc.).

**Please note, if such announcement is not forthcoming before commencement of trading tomorrow, ASX is likely to suspend trading in KBC's securities.**

1. At 10.56 pm AWST on 15 July 2019, Mr Johnson wrote an email to the other directors, Mr Bolton, Mr Ho and Keybridge's legal advisers attaching a draft announcement to present to the ASX. Relevantly, that email said:

If John and/or Jeremy would prefer to discuss alternative announcement options before market opens on Tuesday, then we can hold a Board Meeting at 9am EST as previously discussed - however, I suspect this will not be terribly productive (based upon recent experience!). I confirm that I would he happy for Jeremy to chair that meeting (solely for the purposes of determining a response to the ASX letter, but with no casting vote, obviously).

1. At 11.10 pm AWST on 15 July 2019 Mr Ho sent an email to the directors (including Mr Khan). That email was entitled 'KBC Board Meeting/Discussion via Teleconference - Tuesday, 16 July 2019 at 0700 WST / 0900 EST', and read as follows:

To Discuss ASX Announcement/Trading Halt (if Announcement rejected by ASX)

KBC Board Meeting/Discussion via Teleconference - Tuesday, 16 July 2019 at 0700 WST / 0900 EST

Teleconference OZLINK Dial-in details:

…

1. It is clear from the correspondence above that Mr Johnson and Mr Ho contemplated that the meeting of 16 July 2019 would be for the sole purpose of discussing the draft ASX announcement and the consequences if it were not accepted, and Mr Ho's email convening the meeting recorded that to be the case. The purpose of the meeting was clearly defined in the email sent to the board by Mr Ho.
2. It is also apparent that Mr Bolton was providing advice to Mr Patton as to steps that should be taken at the meeting convened for 16 July 2019. He sent the following email to Mr Patton in the early hours of that day:

Hi John,

So, I would do the following:

- make sure the 9am meeting occurs and is a board meeting with proper notice to all directors. If parties attend, they waive their right to any issue with short notice (although notice was orally given tonight also).

- start the meeting by putting a resolution that Farooq be terminated as alternate director, call a vote (disregarding Farooq's vote).

- ask Farooq to leave the meeting.

- put a resolution to the extent that it is necessary that William be removed as Chairman.

- put a resolution appointing you as Chairman with casting vote (not that you need to be appointed twice)

- put a resolution (if necessary) moving the registered office back to Melbourne.

- put a resolution terminating Victor Ho.

- put a resolution confirming that I am not suspended, and to the extent that they purport I was, ratifying any decisions made as CEO during that time.

- anything else that I've forgotten.

1. The evidence is that prior to the meeting of 16 July 2019, Mr Kriewaldt drafted a letter to Keybridge notifying it of Mr Khan's termination as alternate director. Both Mr Kriewaldt and Mr Patton signed that letter.

## Events of 16 July 2019

1. At 7.00 am AWST on 16 July 2019 the directors dialled into a teleconference meeting.
2. At the beginning of that meeting, it was unanimously agreed by the directors that Mr Kriewaldt would chair the meeting, on the condition that he not exercise a casting vote. Mr Kriewaldt determined that a quorum was present and requested updates on conflicts of interest.
3. Either Mr Patton or Mr Kriewaldt then proposed to pass a resolution that Mr Khan be terminated as alternate director of the company. Mr Patton and Mr Kriewaldt voted in favour of that resolution, whilst Mr Johnson and Mr Khan voted against it. Mr Kriewaldt declared that as Mr Khan could not vote on the resolution, the resolution had passed. Mr Patton then emailed the pre-signed letter referred to above to Mr Khan and the other board members.
4. Both Mr Johnson and Mr Khan then left the meeting.
5. Mr Patton and Mr Kriewaldt then passed a number of resolutions. By those resolutions, the company declared void all resolutions passed by the board on and since 10 July 2019 except where they were passed by all four directors; appointed Mr Patton as company secretary; and instructed Mr Bolton and Mr Patton to navigate through the situation with the other directors.

# Consideration

## The 10 July 2019 meeting

1. I find that the meeting of 10 July 2019 was a meeting of directors. It follows that I reject Mr Patton's evidence that it was no more than a discussion. Mr Patton sought to minimise the importance of the meeting by introducing evidence that he was not really able to hear what was going on, that he was doing other things at the time, and that it was another one of a number of repetitive telephone conversations 'on the same topic'. His evidence lacked credibility in this regard and was self‑serving.
2. I have formed the view that the meeting was a meeting of directors taking into account that Mr Khan's email requests a quick board meeting; that Mr Ho's email arranging the teleconference refers to a teleconference meeting; and the email sent by Mr Ho during the meeting referred to the 'meeting' being 'adjourned'.
3. I consider there was sufficient notice (that is, time given) that the meeting was to occur, taking into account the emails of the same day, the currency of the debate and the fact that Mr Khan's requests for information had been alive for some time.
4. I accept that the constitution provides that notice of a meeting need not state the nature of the business to be transacted at the meeting. That does not prevent the directors from choosing to do so. Indeed, the Court in *La Compagnie De Mayville v Whitley* encouraged such a course, by saying that although it is not essential that a director be given notice of the business to be conducted at the meeting, it may be preferable and prudent to give notice of any special business. The issue of alleged 'ambush' and the nature of any notice that must be given as to business to be transacted at a meeting was at the heart of many of the parties' respective complaints.
5. I accept that it was the practice of the directors of Keybridge to conduct meetings in two ways. I accept that there were regular meetings, attended with a degree of formality in that they were regular, diarised in advance and there was an agenda. I also accept that the directors had a practice whereby they would meet as and when necessary. How such meetings are named is not to the point. Mr Ho and Mr Kriewaldt described them as *ad hoc* and others referred to them at times as informal meetings. They are directors' meetings regardless.
6. However, I find that the *ad hoc* meetings were not meetings that were called without any identified reason. The evidence, in particular that of Mr Kriewaldt, was that the usual practice of the Keybridge board was that an *ad hoc* meeting would be held only on a particular matter or matters that were known to the directors, and that resolutions would not be passed at such meetings without the attendance of all members of the board who could vote on those resolutions.
7. This general practice found specific application in the events of 10 July 2019. Mr Khan's email requesting the meeting formed part of an email chain which exclusively discussed the confidential transaction, and its subject line referred to that transaction. Mr Khan's reference to a 'quick board meeting' and the method of convening the meeting was in line with the usual procedures for convening *ad hoc* meetings described by Mr Ho. Indeed each of Mr Johnson, Mr Ho, Mr Patton and Mr Kriewaldt understood prior to the meeting that the sole purpose of the meeting was to discuss the confidential transaction.
8. Accordingly, in a manner analogous to the position in *Dhami*, the implied message conveyed by Mr Khan's email, with its reference to the $5 million issue and coming after a train of emails on that subject, together with Mr Ho's resulting official invitation, was that the meeting was being summoned 'not to do anything and everything that the board of directors has power to do and may decide to do but for the particularly defined and limited purpose notified', in this case being discussion of the confidential transaction.
9. In that context, it is not appropriate to apply the general principle that directors are expected to come together whenever called on notice of reasonable length and be ready to deal with anything and everything that might be brought up relating to the business of the company. Rather, a director receiving Mr Khan's email and Mr Ho's email of 10 July 2019 would have thought (and in fact did think) that the meeting was to be conducted exclusively within the boundaries of discussing the confidential transaction.
10. Having regard to the statement in *McLure v Mitchell* (1974) 24 FLR 115 at 140that '[t]he purpose of a notice of a meeting is to enable persons to know what is proposed to be done at the meeting so that they can make up their minds whether or not to attend', I consider that the matters that could be dealt with at the meeting of 10 July 2019 were restricted to those that fell within those boundaries, by virtue of the same restriction imposed in *Dhami*, *McLure v Mitchell* or *Efstathis v Greek Orthodox Community of St George* [1989] 1 Qd R 146 at 149‑150.
11. The common understanding of the purpose of the meeting, such purpose having been disclosed by the communications between the directors and Mr Ho preceding and convening the meeting, was to 'discuss' the confidential transaction, rather than to pass binding resolutions. In this way the facts are analogous to those in *Dhami*.
12. In reaching this conclusion, I do not find that when Mr Khan sent his email at 8.16 am AWST he intended to deceive the other directors. He was not frank in his evidence as to communications about the potential to remove Mr Patton as chair and to propose associated resolutions. In cross‑examination he initially denied that he had any communications with third parties prior to 10 July 2019 about the potential to remove Mr Patton, but his email of 3 July 2019 attaching the draft announcement undermines that evidence. His attempt to clarify his answers was not convincing.
13. I consider that whilst Mr Khan had formulated a prospective plan, he had not decided whether or not it would be implemented and was awaiting (perhaps among other things) the expiry of the extension to 9 July 2019 and any information provided by Mr Bolton in order to consider his position. However, it was a plan that was sufficiently advanced to the point that the draft announcement of 3 July 2019 had been prepared. He held genuine grievances and his communications reveal that he was frustrated with a lack of answers.
14. Had he wished to ambush Mr Patton and Mr Kriewaldt (as alleged) and take the first opportunity to exploit the absence of Mr Kriewaldt at a meeting, it is true that he could have done so at the meeting of 3 July 2019 or at the commencement of the meeting of 10 July 2019. I therefore accept that Mr Khan did not know for certain whether or not he might implement his plan at the time he requested the 'quick board meeting' or at the commencement of the 10 July 2019 meeting. However, to my mind he knew that there was the potential that he might deploy his plan that day. I accept he may have reached a point of frustration during the adjournment and so he determined to implement his proposal without notice, having realised that Mr Kriewaldt's absence provided him with that opportunity. However, the fact that he came to that decision during the adjournment rather than prior to or at the commencement of the meeting is not to the point. He implemented his plan in the absence of any notice to Mr Patton and Mr Kriewaldt. Mr Johnson facilitated the implementation of the plan by voting in favour of the resolutions or by failing to seek to adjourn the meeting.
15. A director's obligations and duties as to the convening and conduct of a meeting subsist throughout its course. The directors were entitled to assume that the purpose of the 10 July 2019 meeting was limited to discussion of the confidential transaction. They were entitled to assume that to the extent any business was to be transacted outside that disclosed purpose, they would be given notice. They were entitled to assume that if a matter arose during the course of a meeting that was outside the disclosed purpose, there would be no resolution absent consensus or due notice such that the proposal could be considered by all directors.
16. In my view, it was a breach of Mr Khan's duties in the role of director as to the convening and conduct of meetings, and unfair, to proceed after the adjournment to move and pass resolutions contrary to the implied message conveyed by the communications and notices that the business transacted would be limited to that disclosed as the purpose of the meeting. Mr Johnson breached his duties by going along with that plan and not seeking to adjourn the meeting to provide proper notice to the directors.
17. Had there been consensus, the directors could have moved resolutions transacting business outside of the notified purpose, but there was clearly no consensus in this case.
18. For those reasons, I do not consider the resolutions purportedly passed were valid and I would decline to declare that they were valid.
19. Accordingly, I do not need to determine the many other matters raised by Mr Patton relating to the 10 July 2019 meeting, but I will briefly state the following, taking into account the extensive submissions made on some of these points:
	1. had I found that the resolution to remove Mr Patton was valid, I would have accepted that it was open to the directors present to acquiesce in the appointment of Mr Khan as chair for the balance of the meeting. In the context of a directors' meeting, I do not construe the reference in rule 8.11(c) to the need to 'elect' a new chair to require a formal election. Nor do I consider there is any real difference between 'electing' and 'choosing' in that context;
	2. the chair need not remain the same person during the course of a meeting. A chair may need to be replaced or substituted during a meeting due to, for example, a conflict of interests. The constitution does not prevent replacement; and
	3. in *Toole v Flexihire*, the chair declined to allow a resolution to be brought forward at a directors' meeting, saying that he wished to obtain legal advice and suggesting he might have that advice by the next board meeting. Another director then said that he considered it reasonable to make a decision on the resolution at the meeting. The remaining directors then proceeded to vote on the resolution. The resolution was found to be valid and binding. I would have applied *Toole v Flexihire* and would have accepted, assuming the conduct of the meeting to have been otherwise valid, that it was open to Mr Khan and Mr Johnson to proceed to vote on the resolution despite Mr Patton's purported refusal to permit that course.

## The 16 July 2019 meeting

1. Senior counsel for Mr Patton submitted that if I were to declare the resolutions of 10 July 2019 invalid it would not be necessary to turn to the issues relating to the meeting of 16 July 2019 as, in effect, the status quo prior to that meeting would be restored. If I am wrong as to those resolutions, however, the events of 16 July 2019 remain relevant. Further, the purported resolutions of 16 July 2019 go further than to simply seek to reverse the resolutions of 10 June 2019 in that they also purported to appoint Mr Patton as an additional company secretary.
2. The purpose of the meeting of 16 July 2019 was unequivocally stated in the email from Mr Ho of 11.10 pm AWST on 15 July 2019, being to discuss the draft ASX announcement and the consequences if it were not accepted.
3. Clearly provoked by the actions of Mr Khan and Mr Johnson, Mr Patton and Mr Kriewaldt set about taking advantage of that meeting, and devised a plan to remove Mr Khan as alternate director without notice. That provocation does not, however, justify their actions. Mr Patton, having expressly stated in his email of 10 July 2019 sent after the meeting that any further meetings would require an agenda, chose not to disclose the proposal to move resolutions, including that relating to Mr Khan's removal, prior to the 16 July 2019 meeting.
4. On the basis of the matters discussed above in relation to *Dhami*, it seems to me that this is a clear case where it was not appropriate that the resolution removing Mr Khan be moved or voted upon. There was a clear and deliberate plan on the part of Mr Patton and Mr Kriewaldt to put forward the resolution. They had the letter about Mr Khan's position ready. There was concealment of that plan. It was not open to them to rely on rule 8.9(b) of the constitution when in fact the purpose for the meeting, that did not include any of the matters upon which resolutions were purportedly passed, was unequivocally notified, and they must be taken to have understood that the other directors would proceed on the basis that only the notified business was to be transacted at the meeting. There is no evidence that Mr Cato was on notice of what was proposed. He was denied the opportunity to participate himself in the meeting following the purported termination of Mr Khan's positon, or denied the opportunity to appoint a new alternate. Mr Kriewaldt's role as chair was expressly limited, and those limits were exceeded without notice. In those circumstances, Mr Patton and Mr Kriewaldt breached their duties as to the proper convening and conduct of meetings.
5. Mr Khan's appointment was wrongly terminated. He left the meeting accordingly. In such circumstances business transacted at the meeting is to be treated as void and of no effect: *Wishart v Bokin* (1960) 3 FLR 464 at 466‑467; *Re Chevron Furnishers Pty Ltd (In liq)* [1994] 2 Qd R 475 at 479‑480.
6. In any event the remaining resolutions passed were also outside the scope of the specified purpose of the meeting.
7. For those reasons, I do not consider the resolutions purportedly passed at the 16 July 2019 meeting were valid and I would decline to declare that they were valid.
8. In light of this finding, it is not strictly necessary to determine the issue of the proper construction of s 203E of the *Corporations Act* or rule 8.14(i) of the constitution. However, again, substantive submissions were made on these issues and accordingly I will address them.

## The construction question as to alternate directors

1. The motions proposed without prior notice to Mr Khan, Mr Cato or Mr Johnson and passed at the 16 July 2019 meeting included that Mr Khan be terminated as an alternate director for Mr Cato, with immediate effect, pursuant to rule 8.14(i) of the constitution. After the termination resolution was passed and purportedly given effect by the letter of 16 July 2019 to Keybridge, Mr Patton and Mr Kriewaldt proceeded to pass further resolutions that they allege had the effect of reversing the resolutions made at the 10 July 2019 meeting and also appointing Mr Patton as a company secretary of Keybridge.
2. The plaintiffs contend that the attempt by Mr Patton and Mr Kriewaldt to remove Mr Khan was void pursuant to s 203E of the *Corporations Act* or, alternatively, if it is not void, then it is in any event invalid because the circumstances in which an appointment can be terminated are limited on the proper construction of rule 8.14 of the constitution.

### The Corporations Act and the constitution

1. The key provision is s 203E:

**203E Director cannot be removed by other directors - public companies**

A resolution, request or notice of any or all of the directors of a public company is void to the extent that it purports to:

(a) remove a director from their office; or

(b) require a director to vacate their office.

1. Section 9 defines 'director'. It is important to note that the s 9 dictionary commences with the words, 'Unless the contrary intention appears'. Therefore, the definition of 'director' is as follows:

Unless the contrary intention appears:

…

'***director***' of a company or other body means:

(a) a person who:

(i) is appointed to the position of a director; or

(ii) is appointed to the position of an alternate director and is acting in that capacity;

regardless of the name that is given to their position; and

(b) unless the contrary intention appears, a person who is not validly appointed as a director if:

(i) they act in the position of a director; or

(ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes.

Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body.

Note: Paragraph (b) - Contrary intention - Examples of provisions for which a person referred to in paragraph (b) would not be included in the term 'director' are:

* section 249C (power to call meetings of a company's members)
* subsection 251A(3) (signing minutes of meetings)
* section 205B (notice to ASIC of change of address)
1. The constitution provides relevantly as follows:

**8.14 Alternate directors**

(a) A director may, with the approval of a majority of the other directors, appoint a person to be the director's alternate director for such period as the director decides.

…

(d) In the absence of the appointor, an alternate director may exercise any powers (except the power to appoint an alternate director) that the appointor may exercise.

(e) An alternate director is entitled, if the appointor does not attend a meeting of directors, to attend and vote in place of and on behalf of the appointor.

…

(g) An alternate director, when acting as a director, is responsible to the company for his or her own acts and defaults and is not to be taken to be the agent of the director by whom he or she was appointed.

(h) The office of an alternate director is vacated if and when the appointor vacates office as a director.

(i) The appointment of an alternate director may be terminated or suspended at any time by the appointor or by a majority of the other directors.

(j) An appointment or the termination or suspension of an appointment of an alternate director, must be in writing and signed and takes effect only when the company has received notice in writing of the appointment, termination or suspension.

…

### The parties' positions

1. The plaintiffs contend that as Keybridge is a public company, an alternate director is a director for the purposes of s 203E of the *Corporations Act*. It follows, the plaintiffs contend, that any purported resolution or other conduct in reliance on rule 8.14(i) and any purported written notice given in reliance on rule 8.14(j) is void and of no effect by operation of s 203E of the *Corporations Act*.
2. Mr Patton's overarching submission is that when viewing s 203E within the context of the *Corporations Act*, and in particular Part 2D.3, a contrary intention arises in the sense that the use of the term 'director' in s 203E was not intended to extend to directors other than those appointed as such. That is, the provision is not intended to be read as applying to alternate directors or shadow directors.

### Function of statutory definitions

1. The function of a statutory definition was considered by the High Court in *Gibb v Federal Commissioner of Taxation* (1966) 118 CLR 628 at 635 (Barwick CJ, McTiernan and Taylor JJ), where their Honours said:

The function of a definition clause in a statute is merely to indicate that when particular words or expressions the subject of definition, are found in the substantive part of the statute under consideration, they are to be understood in the defined sense - or are to be taken to include certain things which, but for the definition, they would not include. Such clauses are, therefore, no more than an aid to the construction of the statute and do not operate in any other way. …

1. In *Deputy Commissioner of Taxation (NSW) v Mutton* (1988) 12 NSWLR 104 at 108‑109, Mahoney JA said:

It is, I think, not necessary that what is laid down by the section in question be impossible of operation; it is sufficient if the result of the application of the definition to a section results in the operation of the section in a way which clearly the legislature did not intend. Thus, in *Dealex Properties Ltd v Brooks* [1966] 1 QB 542 at 551, Harman LJ referred to the 'fearful confusion' that would follow the application of the statutory definition.

In the end, what the court does when it decides whether there is a 'contrary intention' is to decide whether it was the intention of the legislature that the statutory provision as to interpretation or definition should apply to the particular section: see *Gibb v Federal Commissioner of Taxation* (1966) 118 CLR 628 at 635. The legislative intention may, perhaps, be more easily seen where the function of the interpretation section is, by providing a simple verbal formula, to avoid the repetition of a 'multiplicity of verbiage': or where the statutory definition adds to or subtracts from what, apart from the definition, would be the meaning of the particular word in the statutory command: see, eg, *R v Brewer*, *YZ Finance Co Pty Ltd v Cummings* (1964) 109 CLR 395.

1. Relying on Mahoney JA's comments in *Mutton*, Mr Patton identifies three factors in support of the contention that s 203E cannot be construed such that a 'director' includes an alternate director:
	1. s 201K and the contemplation in sub-section (4) that 'the appointing director may terminate the alternate's appointment at any time';
	2. the text of s 203E which refers to removal of directors 'from their office' or attempts to require a director to 'vacate their office'; and
	3. the inapplicability of s 203E to shadow directors.

### The s 201K argument

1. To determine whether a contrary intention appears, it is not appropriate that sole focus is given to s 203E: *Official Trustee in Bankruptcy v Buffier* [2005] NSWSC 839; (2005) 54 ACSR 767 at [29] and the authorities therein cited. The definition section and its application must be considered in the context of the *Corporations Act* as a whole.
2. In this case, Mr Patton points to s 201K of the *Corporations Act* which speaks to how an alternate director can be appointed and terminated:

**201K Alternate directors (replaceable rule - see section 135)**

(1) With the other directors' approval, a director may appoint an alternate to exercise some or all of the director's powers for a specified period.

(2) If the appointing director requests the company to give the alternate notice of directors' meetings, the company must do so.

(3) When an alternate exercises the director's powers, the exercise of the powers is just as effective as if the powers were exercised by the director.

(4) The appointing director may terminate the alternate's appointment at any time.

(5) An appointment or its termination must be in writing. A copy must be given to the company.

Note: ASIC must be given notice of the appointment and termination of appointment of an alternate (see subsections 205B(2) and (5)).

1. Mr Patton contends that it is significant that s 201K(4), being a replaceable rule, expressly contemplates that an alternate director can be removed by the appointing director and, therefore, the *Corporations Act* contemplates that a constitution may permit something that would not be permitted if, as the plaintiffs submit, alternate directors cannot be removed by another director.
2. Section 203E states a resolution, request or notice of 'any' or all of the directors of a public company is void to the extent that it purports to remove a director. Mr Patton contends that s 203E can only be read harmoniously with s 201K(4) if it is construed as not applying to alternate directors, given that s 201K(4) contemplates removal by a single director: that if the provision was construed so as to extend to alternate directors, even the appointing director would not be able to remove the alternate director, notwithstanding having appointed him. The improbability of the legislature intending to at the one time authorise removal of an alternate director by another director and at the same time prohibit it is said to point to the conclusion that, properly construed, the word 'director' in s 203E is not intended to extend to alternate directors.
3. However, it is important to identify that the single director who Mr Patton refers to in submissions on s 201K(4) is the appointing director. The capacity to appoint an alternate director ensures a director is able to participate in meetings and vote in place of the appointing director and so ensures the appointing director's seat at the directors' table is filled. The capacity to appoint an alternate ensures that the number of directors exercising powers can be maintained as anticipated by the shareholders who have appointed them.
4. There can be no doubt that a director must be able to terminate their own appointment of their alternate and so resume their own place at the directors' table. An appointing director is in a position to know when it is convenient to terminate the alternate's appointment: that is, where the appointing director controls that process, they are able to ensure they can recommence the personal exercise of their powers or, if necessary, appoint a further alternate.
5. If, on the other hand, the appointment of the alternate director can be terminated by others without the appointing director's knowledge or participation, then removal has the immediate effect of depriving the appointing director of the ability to exercise their powers and reduces the number of directors who are in a position to exercise rights and powers at meetings below the number appointed by the shareholders.
6. A construction of s 203E that includes an alternate director affords procedural fairness to directors in that a director will have notice of any proposal to remove the alternate. Shareholders will also have notice of a pending removal and so are accorded the opportunity to take whatever steps they consider appropriate to maintain director numbers.
7. While the phrase in s 203E 'any or all of the directors of a public company' is prima facie wide enough to capture the director who appointed the alternate, a harmonious reading of s 203E and s 201K is achieved by construing s 203E as meaning an alternate cannot be removed by 'any or all of the directors of a public company' other than the director who appointed them to represent their interests. That is, the general provision in s 203E can be read subject to the specific provision in s 201K. Where there is a conflict between a general provision and a specific provision, the specific provision prevails. The approach taken by the courts was stated by O'Connor J in *Goodwin v Phillips* (1908) 7 CLR 1 at 14:

Where there is a general provision which, if applied in its entirety, would neutralize a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply.

1. Therefore, in my view, the inclusion of s 201K in the *Corporations Act* does not compel a finding that 'director', where used in s 203E, is not intended to refer to an alternate director of a public company.
2. The evident policy behind s 203E is to ensure that directors are not removed indiscriminately by other directors and thereby shareholders' elected representatives are removed from their positions. The construction I have preferred is consistent with this policy.

### Reference to the 'office' of director

1. Mr Patton suggests a further indication that s 203E was not intended to extend to alternate directors is seen from the term 'their office' appearing in both subsections. Mr Patton submitted that removal of an alternate director under rule 8.14(i) and (j) of the constitution has no effect on the office of a director and is not one of the circumstances in which 'the office of a director becomes vacant'. That is because an alternate director is not appointed to hold or occupy the 'office' of a director, but merely acts in lieu of the appointing director. This is evident, it was submitted, when the language in s 203E regarding the removal or vacation of a director from 'their office' is contrasted with that in s 201K(1) concerning the appointment of an alternate director 'to exercise some or all of the director's powers for a specified period'.
2. Again, I do not find the argument compelling. While an alternate director is not the holder of the office or position of director, when an alternate exercises the director's powers, the exercise of the powers is just as effective as if the powers were exercised by the director: s 201K(3). An alternate director is subject to all common law and statutory duties owed by a director to a corporation: *Markwell Bros Pty Ltd v CPN Diesels (Qld) Pty Ltd* [1983] 2 Qd R 508. As Thomas J observed in *Markwell Bros* at 519, generally speaking alternate directors are in the eyes of the law in the same position as any other director. I am not satisfied that use of the word 'office' supports a finding of a contrary intention when, while acting as an alternate director, the alternate is for the purposes of the law acting in that office. 'Office' is not defined in the *Corporations Act* and so there is no other particular limitation imposed by the statute in the use of that word. And whilst it is perhaps not of any great weight, it is interesting to note that Keybridge's constitution refers to the 'office of an alternate director' (see rule 8.14(h)), indicating a customary use of the word 'office' that extends to the position of an alternate director.

### Shadow directors

1. The final point that Mr Patton raises in support of there being a contrary intention to the application of the extended definition of director is that this approach would give rise to s 203E being read to encompass 'shadow directors' which are contemplated by sub‑section (b) of the definition of 'director'. If the terms of s 203E were to be read as prohibiting the termination of shadow directors, the provision would give rise to unworkable consequences and would be inconsistent with the notion that control of a company is to be vested ultimately in the board of directors, as appointed by and answerable to the shareholders.
2. However, it is important to identify that 'shadow directors' are the subject of an additional qualification in s 9 (see the wording of (b) of the definition and the inclusion of the words 'unless the contrary intention appears').
3. The operation of the notes to the definition was considered in *Official Trustee in Bankruptcy v Buffier*. There Campbell J observed:

[31] The note to the definition of 'director' is one which appeared in the government printer's text of the Corporations Act 2001 (Cth), and also appeared in the Corporations Bill 2001 when it was laid before parliament. Thus, even though pursuant to s 13(3) of the Acts Interpretation Act 1901 (Cth) those notes are not part of the Act, they can be used, pursuant to s 15AB of the Acts Interpretation Act as an aid to construction.

[32] The examples given in that note of when a 'contrary intention' is shown include, in their reference to ss 249C and 251A(3), examples where the contrary intention can be gathered from an appreciation of how the application of the definition in those sections would work in practice, rather than from any textual clues.

1. It is clear to me that s 203E can be fairly interpreted as being inapplicable to shadow directors. As shadow directors are not validly appointed, there is no necessity for any formal termination of their appointment. Therefore, on a consideration of how the section would work in practice, I consider that the word 'director' in s 203E does not extend to a shadow director, a contrary intention being apparent.
2. In conclusion, I consider that s 203E applies in the case of an alternate director of a public company.

## Construction of rule 8.14(i) of the constitution

1. Rule 8.14(i) provides that '[t]he appointment of an alternate director may be terminated or suspended at any time by the appointor or by a majority of the other directors'. The question is whether properly construed the rule permits an alternate director's position to be terminated mid-meeting and where further business is then transacted.
2. The constitution of a company constitutes a contract between the members of the company *inter se*, between the company and its members and between the company and its officers: s 140 of the *Corporations Act*.
3. In *Aveo Group Limited v State Street Australia Ltd in its capacity as custodian for the Retail Employees Superannuation Pty Limited as trustee of the Retail Employees Superannuation Trust* [2015] FCA 1019 at [59], Beach J set out the following principles relevant to the construction of a corporate constitution:
* a constitution should be read and construed as a whole;
* *general* principles of construction of commercial contracts (see generally *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35]) are applicable to a constitution; more particularly, the commerciality of a particular construction may tip the balance in its favour where it is implausible that the parties could be taken to have intended otherwise;
* a constitution should not be construed narrowly or pedantically;
* words used should usually be given their natural and ordinary meaning;
* a construction of a provision which gives a congruent operation of the various applicable provisions of a constitution should be preferred to another construction which does not; and
* extrinsic evidence *may* be adduced as an aid to construction, subject to a qualification that I will address in a moment, but only in the limited manner envisaged in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22] and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [35] to [41].
1. A purposive interpretation, rather than a creative interpretation, of a corporate constitution should be afforded, so long as it is understood that this is an objective exercise bounded by such principles: *Aveo Group* at [60].
2. I consider that on the proper construction of the constitution, if the appointor director does not attend a meeting of directors, an alternate director is entitled to attend and to vote in place of and on behalf of the appointing director for the duration of the meeting. The alternate director continues to be entitled to attend and vote at a meeting that has commenced but has not concluded at the time of the termination of the appointment. It is therefore implicit that any written notice of termination would not issue to the company until (at the earliest) the conclusion of a meeting.
3. Reasonable business people would not consider that an alternate director's appointment could be terminated in the middle of a directors' meeting where there might be no notice prior to the meeting of such termination. Such a construction would have the effect of excluding the appointor from whatever business is transacted after the alternate is removed. Put another way, such a construction could work to deprive the appointing director of the benefit of rule 8.14 and undermine the evident purpose of that rule. I accept the plaintiffs' submission that such a construction should be rejected.

## Section 1322 relief

1. The parties raised, but did not pursue with any vigour, the question of relief under s 1322(4) of the *Corporations Act* with respect to the meetings of 10 July 2019 and 16 July 2019.
2. The principles are well established and discussed and collected elsewhere: see, for example, *In the matter of Warwick Keneally as administrator of Australian Blue Mountain International Cultural & Tourist Group Pty Ltd (admin apptd)* [2015] NSWSC 937 at [66]‑[71].
3. I will deal with this only briefly. It seems to me that the injustice that exposed directors to meetings where business was purportedly transacted outside the scope of that which was notified and without adjournment to consider options was substantial and outweighs the injustice of not validating such irregularities or contraventions.
4. Had Mr Kriewaldt been informed that the purpose of the 10 July 2019 was not limited to the discussions as portrayed but would (at least after the adjournment) extend to the matters of the nature of the resolutions that were purportedly passed, then it is inevitable, in my view, that he would have attended by telephone.
5. Had Mr Cato or Mr Khan been informed that a resolution would be put removing Mr Khan as Mr Cato's alternate and with immediate effect mid‑meeting, then they would have had the opportunity to arrange for Mr Cato's attendance in person or attempted to pursue the immediate appointment of another alternate director.
6. I would not be persuaded in any event that in the circumstances of this case I should exercise my discretion to grant relief under s 1322(4).
7. The position may well have been different if the only defects or contraventions as to which relief were sought were of a minor nature, such as the following that were raised by Mr Patton with respect to the 10 July 2019 meeting: an alleged failure to make a statement at the beginning of the directors' meeting as to who was chairing the meeting; the alleged failure to have one director present at the deemed location of a meeting, contrary to rule 8.7(c) of the constitution; the failure to invite statements of conflicts or declarations of interest at the start of the meeting (where the directors should know of their disclosure obligations in any event); and the alleged failure to have minutes approved at a subsequent meeting (as to which see *Toole v Flexihire* at 462).
8. However, the contraventions complained of as to the conduct of the respective meetings that are the primary subject of these reasons are of a more significant nature.

# Conclusion

1. The plaintiffs and Mr Patton seek declaratory relief by their respective claims and cross‑claims.
2. The outcome is as follows:
	1. the plaintiff's application for a declaration that the resolutions purportedly passed by the board of Keybridge on 10 July 2019 are valid and of full force and effect is refused;
	2. the plaintiff's application for a declaration that the resolutions purportedly passed by the board of Keybridge on 16 July 2019 are invalid and of no force and effect is granted;
	3. the third defendant's cross-claim for a declaration to the effect that the resolutions purportedly passed by the board of directors of Keybridge on 10 July 2019 are invalid and of no force and effect is granted;
	4. the third defendant's cross-claim for a declaration to the effect that the resolutions purportedly passed by the board of directors of Keybridge on 16 July 2019 are valid and of full force and effect is refused.
3. The parties each sought additional relief. Before me they were uncertain as to whether further relief was in fact required. Having regard to my reasons and the declarations and orders proposed, I decline to make an order, as requested by the plaintiffs, restraining Mr Patton from acting as chairperson at the general meetings scheduled for 14 October 2019. I also decline to declare that Mr Patton is the validly appointed chairperson of Keybridge, a declaration he has requested. Such matters ought to now be addressed by the directors having regard to these reasons and the relevant provisions of the constitution. In any event, I understand that the issue as to who should chair the general meetings should no longer be live as the directors have (properly) resolved to appoint an independent chairperson for that purpose. There will be liberty to apply, limited to any relief sought that relates to the proposed appointment of an independent chairperson for the general meetings of the members of the first defendant scheduled for 14 October 2019.
4. The claim and counterclaim are otherwise dismissed.
5. As indicated at the hearing, I will hear the parties as to costs in due course.

|  |
| --- |
| I certify that the preceding two hundred and four (204) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Banks-Smith. |

Associate:

Dated: 11 October 2019

ANNEXURE A

**8.8 Calling meetings of directors**

(a) A director may, whenever the director thinks fit, call a meeting of the directors.

(b) A secretary must, if requested by a director, call a meeting of the directors.

**8.9 Notice of meetings of directors**

(a) Notice of a meeting of directors must be given to each person who is at the time the notice is given:

(1) a director, except a director on leave of absence approved by the directors; or

(2) an alternate director appointed under rule 8.14 by a director on leave of absence approved by the directors.

(b) A notice of a meeting of directors:

(1) must specify the time and place of the meeting;

(2) need not state the nature of the business to be transacted at the meeting;

(3) may, if necessary, be given immediately before the meeting;

(4) may be given in person or by post or by telephone, fax or other electronic means; and

(5) will be taken to have been given to an alternate director if it is given to the director who appointed that alternate director.

(c) A director or alternate director may waive notice of a meeting of directors by giving notice to that effect in person or by post or by telephone, fax or other electronic means.

(d) Failure to give a director or alternate director notice of a meeting of directors does not invalidate anything done or any resolution passed at the meeting if:

(1) the failure occurred by accident or inadvertent error; or

(2) the director or alternate director attended the meeting or waived notice of the meeting (whether before or after the meeting).

(e) A person who attends a meeting of directors waives any objection that person may have to a failure to give notice of the meeting.

**8.10 Quorum at meetings of directors**

(a) No business may be transacted at a meeting of directors unless a quorum of directors is present at the time the business is dealt with.

(b) Unless the directors decide differently, 2 directors constitute a quorum.

(c) If there is a vacancy in the office of a director, the remaining directors may act. But, if their number is not sufficient to constitute a quorum, they may act only in an emergency or to increase the number of directors to a number sufficient to constitute a quorum or to call a general meeting of the company.

**8.11 Chairperson and deputy chairperson of directors**

(a) The directors may elect a director to the office of chairperson of directors and may elect one or more directors to the office of deputy chairperson of directors. The directors may decide the period for which those offices will be held.

(b) The chairperson of directors is entitled (if present within 10 minutes after the time appointed for the meeting and willing to act) to preside as chairperson at a meeting of directors.

(c) If at a meeting of directors:

(1) there is no chairperson of directors;

(2) the chairperson of directors is not present within 10 minutes after the time appointed for the holding of the meeting; or

(3) the chairperson of directors is present within that time but is not willing or declines to act as chairperson of the meeting,

the deputy chairperson if any, if then present and willing to act, is entitled to be chairperson of the meeting or if the deputy chairperson is not present or is unwilling or declines to act as chairperson of the meeting, the directors present must elect one of themselves to chair the meeting.

**8.12 Decisions of directors**

(a) The directors, at a meeting at which a quorum is present, may exercise any authorities, powers and discretions vested in or exercisable by the directors under this constitution.

(b) Questions arising at a meeting of directors must be decided by a majority of votes cast by the directors present and entitled to vote on the matter.

(c) Subject to rule 8.12(d), if the votes are equal on a proposed resolution, the chairperson of the meeting has a casting vote, in addition to his or her deliberative vote.

(d) Where only 2 directors are present or entitled to vote at a meeting of directors and the votes are equal on a proposed resolution:

(1) the chairperson of the meeting does not have a second or casting vote; and

(2) the proposed resolution is taken as lost.

…

**8.14 Alternate directors**

(a) A director may, with the approval of a majority of the other directors, appoint a person to be the director's alternate director for such period as the director decides.

(b) An alternate director may, but need not, be a member or a director of the company.

(c) One person may act as alternate director to more than one director.

(d) In the absence of the appointor, an alternate director may exercise any powers ( except the power to appoint an alternate director) that the appointor may exercise.

(e) An alternate director is entitled, if the appointor does not attend a meeting of directors, to attend and vote in place of and on behalf of the appointor.

(f) An alternate director is entitled to a separate vote for each director the alternate director represents in addition to any vote the alternate director may have as a director in his or her own right.

(g) An alternate director, when acting as a director, is responsible to the company for his or her own acts and defaults and is not to be taken to be the agent of the director by whom he or she was appointed.

(h) The office of an alternate director is vacated if and when the appointor vacates office as a director.

(i) The appointment of an alternate director may be terminated or suspended at any time by the appointor or by a majority of the other directors.

(j) An appointment, or the termination or suspension of an appointment of an alternate director, must be in writing and signed and takes effect only when the company has received notice in writing of the appointment, termination or suspension.

(k) An alternate director is not to be taken into account in determining the minimum or maximum number of directors allowed or the rotation of directors under this constitution.

(l) In determining whether a quorum is present at a meeting of directors, an alternate director who attends the meeting is to be counted as a director for each director on whose behalf the alternate director is attending the meeting.

(m) Except with the approval of the directors but subject to rule 6.3, an alternative director is not entitled to any remuneration from the company in respect of that position.